> private decision, *i.e.*, this case does not fall within the abuse of authority doctrine recognized in *Monroe v. Pape*, 365 U.S. 167 (1961). ***That respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision.***

See id. at 940 (emphasis added). Consequently, although the respondents had invoked the aid of the sheriff in executing the writ of attachment, the petitioner failed to allege facts that could be attributed to the State because the alleged conduct was only a *misuse* of the statute, rather than an act sanctioned by state policy. As a result, this Court concluded that, as to count two, the petitioner did not state a cause of action under § 1983. *See id.*

Lugar reached a different conclusion with respect to count one, the petitioner's constitutional challenge to the exercise of the underlying state statutory attachment procedures. In contrast to count two, which "[did] not describe conduct that [could] be attributed to the State," count one "challenge[d] the state statute as procedurally defective under the Fourteenth Amendment," and was therefore "obviously . . . the product of state action." *See id.* at 941. Under the second factor in its state action analysis, this Court also reasoned that the county sheriff's "joint participation" in the seizure of the disputed property transformed the respondents into state actors. *See id.* at 941-42. It explained that, because the State created the system under which state officials would attach property on the ex parte application of one party in a private dispute, it was sufficient for the purpose of satisfying the second "state actor" requirement—and only for that purpose—that the respondents "invok[ed] the aid of state officials to take advantage of state-attachment procedures." *See id.* at 942. As the Tenth Circuit correctly concluded, this

analysis cannot assist Petitioners in stating a claim because they alleged only private misuse of a statute or rule, not that any statute itself was unconstitutional. *See* Pet. App. at 55a-57a, ¶¶ 168-182.

What is clear from *Lugar*, and what Petitioners ignore, is that the level or degree of a law enforcement officer's joint participation goes only to whether a private party may be fairly said to be a state actor under the second prong of the state action test. It does *not* satisfy the first "state causation" prong, which requires that the private conduct must first be attributable to the State.

Applying *Lugar*, the Tenth Circuit correctly concluded that Petitioners' claim fails because they did not allege any facts that satisfy the first "state causation" prong. In their complaint, Petitioners only alleged that Respondents "misused" state discovery procedures to obtain an unlawful court order, and that the deputy sheriffs assisted Respondents by discharging their duties "pursuant to orders from a state court judge." *See id.* at 57a, ¶ 182. Factually, Petitioners' claim is indistinguishable from the private misuse claim this Court rejected in *Lugar*. As a result, Respondents actions "could in no way be attributed to a state rule or a state decision." *See Lugar*, 457 U.S. at 940.

Petitioners spend much of their petition implying that the first prong of the state action test can be satisfied if the degree of police participation in the deprivation is sufficiently high, purportedly under the "abuse of authority" doctrine set forth in *Monroe v. Pape*, 365 U.S. 167 (1961). Petitioners even go so far as to suggest that all that is necessary to satisfy the

"abuse of authority" doctrine is the allegation "that the police committed the constitutional deprivation." Pet. at 20.[1]

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[1] Petitioners' related argument that police officers should be free to ignore court orders, and that every police offer who "chooses" to comply with an excessive order is engaged in a discretionary "abuse of authority," is certainly novel. Aside from the fact that the argument is flatly inconsistent with *Lugar* and would impermissibly collapse the two prongs of the state action test, the argument is legally unfounded. Petitioners rely on *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005), claiming that this Court recently reversed the Tenth Circuit and held that "police have the discretion to disobey even apparently mandatory orders." *See* Pet. at 13.

Town of Castle Rock, however, did not address the *Monroe* abuse of authority doctrine, nor did it establish such a blanket rule. That case dealt with the specific question of whether an individual was entitled to the enforcement of a restraining order under the particular language of a Colorado mandatory arrest statute. *See* 125 S. Ct. at 2805-06. In addressing that question, this Court commented that, based on the unique language of the Colorado statute which provided that "police '*may* arrest' when they possess a warrant 'commanding' arrest," "it remains within the discretion of the police whether and when to execute [a warrant under the Colorado mandatory arrest statute]." *See id.* at 2808 & n.11 (emphasis added). This Court did not purport to establish a generally applicable rule under which officers are granted unfettered discretion to decide whether to execute a warrant or court order based on their individual judgment as to its constitutionality; nor did it conclude that an officer's decision to execute such an order pursuant to his statutory duties could constitute an abuse of authority that triggers § 1983 liability for any private party involved in its execution.

It would establish dangerous precedent indeed if police officers were encouraged to act as *de facto* appellate judges every time an order were issued, independently declaring in each instance whether the officer believes the order to be constitutional. The

Petitioners' assertion is clearly and obviously incorrect. This Court unequivocally rejected the same argument in *Lugar* when it refused to hold a private party liable under § 1983 even though the *county sheriff* committed the constitutional deprivation by executing a writ of attachment in furtherance of the private party's misuse of a state statute. *See Lugar*, 457 U.S. at 924, 940. If Petitioners' contention were the law, *Lugar* would not have found that the petitioner's private misuse claim failed to allege the requisite state action under § 1983. Indeed, Petitioners' erroneous view of the "abuse of authority" exception would sweep so broadly that the first prong of the state action test would be satisfied any time the police were involved, no matter in what capacity, rendering meaningless the distinction between the two prongs that was central to this Court's decision in *Lugar*.

As the Tenth Circuit correctly recognized, the *Monroe* abuse of authority doctrine does not turn on how much joint action exists between the private party and the state official, but rather on the source of the official involvement.[2] Specifically, the abuse of authority doctrine is reserved for those situations where a private party *directly* solicits or

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courts, not individual police officers, are the appropriate authorities for making such determinations, and in executing such orders, the police are unquestionably acting within the scope of their statutory duties.

[2] As discussed in further detail in Section II, *infra*, an officer does not "abuse his authority" when he simply executes a court order pursuant to his statutory duties, as directed by a judge, nor does his assistance constitute a "conspiracy." To hold otherwise would create a potential § 1983 claim against private litigants every time the police were involved in executing a court order, dramatically expanding the scope of § 1983 liability.

conspires with a state official to assist in an unconstitutional deprivation, and the state official thereafter abuses his or her authority by putting the apparent weight of the state behind the *private party's* unlawful decision. *See Lugar*, 457 U.S. at 940. Where the state official's involvement is merely in the role of enforcing a court order, as in *Lugar* and in this case, that involvement alone cannot satisfy the first prong of the state action test.

The Tenth Circuit Court of Appeals made a fact-bound determination that Petitioners' allegations in this case did not fall within the narrow scope of the abuse of authority exception because "the police, in executing the court order, were merely discharging their statutory duties." Pet. App. at 14a-15a. That determination was a correct application of *Lugar* and does not warrant review.

II. There Is No Circuit Split on the § 1983 Question Presented.

In a further effort to persuade this Court to grant their petition for certiorari, Petitioners attempt to manufacture a "circuit split" between the Tenth Circuit's opinion and two decisions from the Seventh and Ninth Circuits. Specifically, Petitioners point to *Greco v. Guss*, 775 F.2d 161 (7th Cir. 1985), and *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983), as evidence of this purported circuit split. Far from evidencing a conflict, however, *Howerton* and *Greco* are entirely consistent with the Tenth Circuit's opinion. As demonstrated below, those cases reach different results not because they apply a different legal interpretation of *Lugar,* but because they involved facts that satisfied the abuse of authority doctrine—i.e., allegations that the private defendants *directly* invoked the aid of the police officers in furtherance of their private misuse of a state statute, rather than merely

having the police execute a court order pursuant to a state statute.

In *Howerton*, for example, two landlords who wished to evict the plaintiffs used a police officer to serve a legally deficient eviction notice on the plaintiffs. *See* 708 F.2d at 381. When the plaintiffs failed to vacate their residence, the landlords returned several days later and, accompanied by another on-duty police officer who was also the landlords' tenant, warned the plaintiffs that their water and power would be disconnected if they did not leave immediately. *See id.* Later, the same officer returned alone to the plaintiffs' residence, at which time he falsely informed plaintiffs that the landlords were using proper eviction procedures and advised plaintiffs that they should quit the premises. *See id.* The officer subsequently accompanied the landlords when they disconnected the plaintiffs' power services. *See id.*

Although the district court concluded that there was insufficient state action to constitute action under color of state law, the Ninth Circuit Court of Appeals reversed the district court. *See id.* at 384. Taking care to distinguish the facts in *Howerton* from the unlawful use of prejudgment attachment procedures alleged in *Lugar*, the court explained that, unlike *Lugar*, where the private party involved a county sheriff in a private action by improperly invoking the attachment statute under which the sheriff was obligated to comply, *Howerton* fell within the *Monroe* abuse of authority doctrine because the landlords directly invoked the authority of the officers themselves. *See id.* at 384 n.9. Having determined that the plaintiffs satisfied *Lugar's* first "state causation" prong, the court reasoned that because the landlords repeatedly requested police aid to effect their private eviction action and the police intervened at every step of the

eviction, the landlords could also be fairly said to be state actors. *See id.* at 384-85 & n.9.

The Seventh Circuit Court of Appeals reached a similar conclusion in *Greco*. In that case, three private individuals employed the assistance of a deputy sheriff to serve an improper distress warrant, which the sheriff misrepresented to the plaintiffs was legal, under a state self-help remedy statute that authorized landlords—but not state agents—to effect the distraint. *See id.* at 164, 166, 168. On appeal, the Seventh Circuit Court of Appeals concluded that the private parties acted under color of state law. *See id.* at 169.

The *Greco* court began by explicitly rejecting the contention, advanced by Petitioners here, that the first "state causation" prong of the *Lugar* test is automatically satisfied when a private party acts jointly with a state official to effect a deprivation of property. *See id.* at 167. Looking to the first "private misuse" allegation in *Lugar*, the court of appeals explained that if the involvement of state agents alone were enough to make a private party a state agent, *Lugar* would not have had to look to the statute itself to satisfy the first state causation prong. *See id.* at 167. The court went on to observe, however, that under the *Monroe* abuse of authority doctrine, "even if a private party misuses a state statute, the deprivation can still be under color of law if the authority of state officials puts the weight of the State behind their private decision." *See id.* Citing *Howerton* as an example of just such a case in which "the *use of police*, and *not the state statute*, put the weight of the state behind [the landlords'] private decision to evict," the court concluded that, like the landlords in *Howerton*, the private parties' conduct in *Greco* also could be fairly said to fall under the abuse of authority doctrine because the private parties independently "conspired with the deputy sheriff to deprive [the plaintiffs] of their

property without process." *Id.* at 167-68 (emphasis added). Thus, the private parties' actions satisfied both the first and second prongs of *Lugar's* state action test. *See id.*

Contrary to Petitioners' assertions, the Tenth Circuit's opinion in this case is in complete harmony with the law applied by *Howerton* and *Greco*. The only difference lies in the specific facts of each case. All three opinions recognize that the private misuse of a state statute or procedure may constitute state action for purposes of § 1983 only if the factual allegations demonstrate that police involvement falls within the abuse of authority doctrine. *See* Pet. App. at 14a n.11. Unlike the plaintiffs in *Howerton* and *Greco*, however, Petitioners here did not allege that Respondents directly invoked the aid of the sheriff's office, thus putting the weight of the state behind a purely *private* decision to commit an unconstitutional deprivation. *See id.* at 8a, 14a n.11. Just as this Court found in *Lugar,* the Tenth Circuit correctly concluded that the police involvement in this case existed "solely by the issuance of the state court order," Pet. App. at 14a n.11, the execution of which was within the officer's statutory duties. As a result, it was unnecessary to look to the level of police involvement under the second prong of the state action test. Had *Howerton* and *Greco* involved similar facts, those courts could not have concluded any differently under *Lugar*.

Consistency within the circuits is further demonstrated in *Winterland Concessions Co. v. Trela*, 735 F.2d 257 (7th Cir. 1984)—a Seventh Circuit Court of Appeals decision conspicuously missing from Petitioner's brief, and which *Greco* notably cited with approval. *See Greco*, 775 F.2d at 167. In *Winterland*, the defendant, much like Petitioners here, claimed that the plaintiff, through its agents and attorneys, had acted jointly with representatives of the U.S.

Marshals Office and the Chicago Police Department to deprive the defendant of his rights under the Fourth Amendment by using improper ex parte seizure orders to conduct illegal searches of his home and business. *See* 735 F.2d at 261-62. In rejecting the defendant's contention, the Seventh Circuit Court of Appeals succinctly explained:

> It is true that joint action between a private plaintiff and a governmental actor in the seizure of disputed property will support a claim under § 1983. However, a private misuse of a statute or procedure, as alleged here, does not describe conduct which is actionable under § 1983 . . . ***despite the participation of state officers in effecting statutory processes. [Defendant] alleges no facts which show that the various state and federal officers were doing more than simply discharging the duties of their offices.***

Id. at 262 (emphasis added). The Tenth Circuit Court of Appeals' case is factually and analytically indistinguishable from *Winterland*.[3]

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[3] The Second and Eighth Circuits have concluded similarly. *See Dahlberg v. Becker*, 748 F.2d 85, 87-88, 90-91 (2d Cir. 1984) (dismissing a § 1983 action against a private party for unlawful arrest and imprisonment where the private party obtained an unlawful commitment order and caused the sheriff to arrest and detain plaintiff overnight in a county jail); *Roud[illegible]ush v. Zabel*, 813 F.2d 173, 175-177 & n.7 (8th Cir. 1987) (concluding a private party did not act under color of state law for purposes of § 1983 where the private party fraudulently obtained a writ of execution and caused a county sheriff to levy property in accordance with the writ).

In short, the purported circuit split Petitioners attempt to manufacture is nothing but a fiction. Ultimately, the Tenth Circuit Court of Appeals made a fact-bound determination of well-settled law that follows directly from this Court's decision in *Lugar*. Petitioners' mere disagreement with that conclusion has no legal merit, and it does not warrant this Court's review.

III. The Tenth Circuit Court of Appeals Did Not Apply a Heightened Pleading Requirement for § 1983 Civil Rights Claims.

Finally, Petitioners' tautological contention that the Tenth Circuit somehow created a "heightened pleading standard" for civil rights claims, apparently based solely on the fact that the Tenth Circuit affirmed the dismissal of Petitioners' claims on the pleadings, is baseless and does not merit lengthy discussion. *See* Pet. at 16-17. Simply stated, the Tenth Circuit's opinion imposes no such requirement.

Contrary to Petitioners' argument, dismissing Petitioners' § 1983 claims for failing to plead facts that are consistent with the substantive law established by *Lugar* did not establish a "heightened pleading standard." Under Federal Rule of Civil Procedure 12(b)(6), a plaintiff is required to plead facts sufficient to state a claim on which relief may be granted. Petitioners failed to do so in this case. Even accepting all well-pleaded facts as true and construing all reasonable inferences in Petitioners' favor, the Tenth Circuit affirmed the dismissal of Petitioners' claims because they alleged neither that the state statutes or discovery rules were unconstitutional nor any facts showing the direct solicitation of state officials necessary to trigger the *Monroe* abuse of authority exception. *See* Pet. App. at 4a-5a, 7a-9a & n.1. As a result, Petitioners' complaint did not satisfy the first prong of the state action test

and the majority correctly concluded that Petitioners' claims should be dismissed because they were indistinguishable from those claims rejected by this Court in *Lugar*. *See id.* at 8a-9a. Because the Tenth Circuit Court of Appeals neither purported to, nor did in fact, apply a heightened pleading standard, and because its decision correctly applied this Court's well-settled precedent, this Court should reject Petitioners' petition for certiorari.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully Submitted,

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